

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Estate of Clinton Dewayne Smith, et al.,

10 Plaintiffs,

11 v.

12 John T. Shartle, et al.,

13 Defendants.
14

No. CV-18-00323-TUC-RCC

ORDER

15 Currently before the Court is Defendant United States of America's
16 ("Government") Motion to Dismiss for Lack of Jurisdiction. (Doc. 64.) The Government
17 argues that this matter should be dismissed because the Bureau of Prisons ("BOP")
18 employees' cell assignment and safety decisions are immune from suit under the Federal
19 Tort Claims Act ("FTCA"). *Id.* The Court held oral argument on February 21, 2020.
20 Upon consideration of the briefs and argument, the Court will deny the motion.

21 **I. PROCEDURAL BACKGROUND**

22 Convicted sex offender Clinton Dewayne Smith was transferred to the SHU
23 between June 28 and July 4, 2016. (Doc. 1 at p. 3, ¶ 6, No. CV-19-00325-RCC.)¹ Inmate
24 Romeo Giovanni, a former gang member, vehemently opposed being housed with Smith.
25 (*Id.* at ¶ 8.) Giovanni stated to BOP employees that if placed in the same cell, he would
26 kill Smith. (*Id.*) Nevertheless, BOP employees placed the two together. (*Id.* at ¶ 9.) By
27 July 5, 2016, Giovanni followed through on his threats, murdering Smith. (*Id.* at p. 4, ¶

28 ¹ This matter was consolidated with Case No. CV-18-00323-RCC; however, the
operative Complaint against the Government is located in Case No. CV-19-00325-RCC.

1 10.) The BOP employees were unaware of Smith's death until Giovanni notified them by
2 hitting a distress button in the cell. (*Id.* at p. 35, ¶ 187.)

3 Plaintiffs' Complaint alleges that BOP employees' placement of Smith with
4 Giovanni was negligent, and this negligence led to Smith's death. (*Id.* at p 44-47, pp.
5 238-59.)

6 The Government filed the instant Motion to Dismiss, arguing that (1) Plaintiffs'
7 claims are not viable under the FTCA because negligent cell assignment has no private
8 analogue under Arizona law, and (2) BOP's inmate housing and safety decisions are
9 immune from suit under the discretionary function exception to the FTCA. (Doc. 64.)

10 **II. STANDARD OF REVIEW FOR FTCA CLAIMS**

11 In general, the United States enjoys sovereign immunity and cannot be sued unless
12 it has explicitly waived its immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). The
13 FTCA provides a waiver of immunity for the tortious actions of governmental
14 employees. 28 U.S.C. § 2679; *Fed. Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 706 (9th
15 Cir. 1998). Under the FTCA, the Government can be sued "under circumstances where
16 the United States, if a private person, would be liable to the claimant in accordance with
17 the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *United*
18 *States. v. Olsen*, 546 U.S. 43, 44 (2005). This broad waiver is limited, however, by the
19 discretionary function exception. This exception grants the Government immunity from
20 governmental employees' actions "based upon the exercise or performance or the failure
21 to exercise or perform a discretionary function or duty on the part of a federal agency or
22 an employee of the Government." 28 U.S.C. § 2680(a).

23 "[T]o determine whether the discretionary function exception applies, the court
24 must engage in a two-step inquiry." *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir.
25 2000). First, the court must decide "whether the challenged conduct involves an element
26 of judgment or choice." *Id.* "The requirement of judgment or choice is not satisfied if a
27 federal statute, regulation, or policy specifically prescribes a course of action for an
28 employee to follow, because the employee has no rightful option but to adhere to the
directive." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal citations and

1 quotation marks omitted). But an action is discretionary when there are no directives that
2 “dictate[] the precise manner in which the agency is to complete the challenged task.”
3 *Green v. United States*, 630 F.3d 1245, 1249-50 (9th Cir. 2011).

4 If the action is discretionary, the court then considers whether the action “is of the
5 kind that the discretionary function exception was designed to shield.” *Id.* (citing
6 *Gaubert*, 499 U.S. at 322-23). “Because the purpose of the exception is to prevent
7 judicial second-guessing of legislative and administrative decisions grounded in social,
8 economic, and political policy through the medium of an action in tort, . . . the exception
9 protects only governmental actions and decisions based on public policy.” *Gaubert*, 499
10 U.S. at 323 (internal citation and quotation marks omitted). When actions are
11 discretionary, there is a presumption that the actions are grounded in policy
12 considerations. *Id.* at 323-24. And so, “[f]or a[n FTCA] complaint to survive a motion to
13 dismiss, it must allege facts which would support a finding that the challenged actions are
14 not the kind of conduct that can be said to be grounded in the policy of the regulatory
15 regime.” *Id.* at 324-25.

16 “If the challenged action satisfies both []prongs, that action is immune from suit—
17 and federal courts lack subject matter jurisdiction—even if the court thinks the
18 government abused its discretion or made the wrong choice.” *Green*, 630 F.3d at 1249-
19 50.

20 **III. PRIVATE PERSON ANALOGUE**

21 To state a claim under the FTCA, Plaintiffs’ allegations must first demonstrate that
22 “a private individual under like circumstances would be liable under state law.” *United*
23 *States v. Muniz*, 374 U.S. 150, 153 (1963); 28 U.S.C. § 1346(b). This means that “the
24 FTCA applies only if there is a persuasive analogy with private conduct.” *See Westbay*
25 *Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992). Since an FTCA claim must
26 raise liability under state law, “[t]he breach of a duty created by federal law is not, by
27 itself, actionable under the FTCA.” *Francois v. United States*, CV-16-02936-PHX-BSB,
28 2017 WL 467976, at *3 (D. Ariz. Feb. 3, 2017) (quoting *Love v. United States*, 60 F.3d
642, 644 (9th Cir. 1995). Furthermore, “[a]lthough the federal government ‘could never

1 be exactly like a private actor, a court’s job in applying the standard is to find the most
2 reasonable analogy.” *Dugard v. United States*, 835 F.3d 915, 919 (9th Cir. 2016)
3 (quoting *LaBarge v. Mariposa Cty.*, 798 F.2d 364, 367 (9th Cir. 1986).

4 During oral arguments Plaintiffs suggested that the liability imposed upon Arizona
5 nursing home employees presented like circumstances to those raised here. They claimed
6 that a private nursing home employee who cares for a vulnerable elderly person would be
7 liable if that employee (1) negligently placed an elderly patient in a room with another
8 person, (2) knowing that the person had made threats of harm, and (3) as a result of being
9 placed together the elderly patient was in fact harmed. Defendant countered that Plaintiffs
10 have not pointed to any state statute or case law that demonstrates that there is a state law
11 equivalent supporting their example.

12 But, Arizona Revised Statutes section 46-455 does impose civil liability on private
13 nursing home employees under circumstances like those presented here. The statute
14 articulates that “[a] person who has been employed to provide care . . . to a vulnerable
15 adult who causes or permits the life of the adult to be endangered . . . by neglect” may be
16 subject to civil liability. Ariz. Rev. Stat. §§ 46-455(A); 46-455(K).

17 Like a nursing facility employee, a BOP employee is tasked with the care of
18 persons who are dependent upon them to make daily housing and safety determinations.
19 And, like nursing care employees, BOP has a duty to ensure the safety of the persons who
20 reside at the facility. *See* 28 U.S.C. § 4042(2). So, just as a private nursing home
21 employee in Arizona could be held accountable when the employee ignored physical
22 threats to a patient, placed the patient with the person making the threats, and injury
23 resulted; so too could the Government.

24 Plaintiffs have presented a persuasive private person analogy that provides liability
25 under Arizona law.

26 **IV. DISCRETIONARY FUNCTION EXCEPTION**

27 By statute, the BOP must “provide suitable quarters and provide for the
28 safekeeping, care, and subsistence of all [prisoners].” 28 U.S.C. § 4042(2). Many courts
have determined that BOP decisions about inmate housing and safety are discretionary

1 and therefore precluded from suit under the FTCA. *See e.g., Rhodes v. Chapman*, 452
2 U.S. 337, 349 n.14 (1981) (“[A] prison’s internal security is peculiarly a matter normally
3 left to the discretion of prison administrators.”); *Merz v. United States*, 532 F. App’x 677,
4 678 (9th Cir. 2013) (decision to place inmate in cell with another inmate who attacked
5 him was not subject to the liability under the FTCA); *Mitchell v. United States*, 149 F.
6 Supp. 2d 1111, 1114 (D. Ariz. 1999) (movement of inmates discretionary and protected
7 from suit); *Whitefeather v. United States*, CV 12-00270-TUC-JGZ, Doc. 32 at 6 (D. Ariz.
8 Sept. 11, 2013) (granting summary judgment because “BOP’s housing decisions at USP
9 Tucson were discretionary in nature because no federal statute, regulation or policy
10 specifically prescribes the housing designation of inmates”); *Rinaldi v. United States*, 904
11 F.3d 257, 273 (3d Cir. 2018) (housing choices discretionary); *Montez ex rel. Estate of*
12 *Hearlson v. United States*, 359 F.3d 392, 396 (6th Cir. 2004) (BOP officers have
13 discretion regarding how to protect inmates); *Santana-Rosa v. United States*, 335 F.3d 39,
14 43-44 (1st Cir. 2003) (same); *Cohen v. United States*, 151 F.3d 1338, 1143 (11th Cir.
15 1998) (how to provide safe housing for inmates is not specifically mandated); *Calderon*
16 *v. United States*, 123 F.3d at 950 (decisions about how to protect inmates are not
17 specifically defined); *see also Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 795-96
18 (8th Cir. 1998) (C.F.R. regulations about inmate placement are discretionary). For when
19 it comes to the safety and security of inmates, “[p]rison administrators . . . should be
20 accorded wide-ranging deference in the adoption and execution of policies and practices
21 that in their judgment are needed to preserve internal order and discipline and to maintain
22 institutional security.” *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986).

23 However, when a plaintiff can point to a specific measure that an official needed
24 to follow, courts have determined that the issue of whether the regulation was indeed
25 mandatory precludes dismissal based on the FTCA discretionary function exception. *See*
26 *Alfrey v. United States*, 276 F.3d 557, 564 (9th Cir. 2002) (finding response to inmate
27 threat was discretionary, but factual issue remained as to whether a Central Inmate
28 Monitoring evaluation prior to placement was mandatory); *Doe v. United States*, 510 F.
App’x 614, 616 (9th Cir. 2013) (granting of summary judgment reversed and remanded

1 because officer suggested that there was a mandatory policy in place that would have
2 prevented plaintiff's abuse); *Ashford v. United States*, 511 F.3d 501, 505 (5th Cir. 2007)
3 (usually the exception applies to cell assignment, but in this case it did not apply because
4 "there [was] a specific policy in place that constrained the decision-making ability of the
5 prison officials.").

6 a. Discretionary Action

7 Plaintiffs argue there may be some non-mandatory decisions in BOP policy that
8 have yet to be disclosed. They also think some officials at BOP may not have had
9 discretion for certain actions. Therefore, these actions would not be covered by the
10 discretionary function exception. Plaintiffs would like further discovery to find out if
11 these mandatory policies exist.

12 Defendant claims Plaintiffs cannot point to any mandatory measures despite
13 disclosure of all the pertinent statutes, regulations, and policies because there are none. In
14 addition, Defendant claims, there is an abundance of case law demonstrating that safety
15 and cell assignment determinations are discretionary measures not subject to liability
16 under the FTCA.

17 i. *Statutes, Regulations, and Policies*

18 The Court recognizes that many of the statutes, regulations, and policies at issue
19 here are readily available and give BOP considerable latitude when making housing and
20 safety decisions. This suggests discretion. Furthermore, Defendant has averred that they
21 have identified all the applicable statutes, regulations, and policies. However, Plaintiffs
22 are not challenging the disclosed policies. Instead, they argue that what BOP has omitted
23 suggests undisclosed, mandatory policies exist. The Court, therefore, will address
24 Plaintiffs' allegations.

25 ii. *Mandatory Review of Information*

26 First, some of the BOP's Program Statements have been redacted and Plaintiffs
27 cite to the surrounding unredacted portions to show that the redactions may contain other
28 mandatory measures. For instance, they point to the Program Statement that requires
Lieutenants utilize "all available resources and information" in cell assignment decisions.

1 (Doc. 68 at 13.) They claim that “all” means that there are mandatory things BOP must
2 review before determining cell assignments, which demonstrates there is a proper way to
3 conduct cell placement. (*Id.*) Based on the record before the Court, it is impossible to
4 conclude that the redacted portions do not mandate the review of specific documents in a
5 way that eliminates discretion.

6 This is similar to *Alfrey v. United States*, 276 F.3d 557 (9th Cir. 2002). In *Alfrey*,
7 the court found that it was unclear based on the available evidence whether a Central
8 Inmate Monitoring evaluation must be performed prior to inmate placement. *Id.*
9 Likewise, in this case because there is plausible mandatory language and unredacted
10 portions of the Program Statement, the Court cannot determine whether there were
11 certain documents that had to be reviewed before placement, and further discovery is
12 warranted before making this determination.

13 *iii. Separation Requirements*

14 Next, Plaintiffs note that the Special Post Order mandating “all available
15 resources” does so because there are “many separation requirements . . . in [the SHU.]”
16 (Doc. 64-2 at 62). Plaintiffs claim the undisclosed separation requirements may also be
17 mandatory and may have specifically prohibited Giovanni from being placed with Smith
18 because of his separation classification, likely due to prior acts of violence. (Doc. 1 at 38-
19 39, ¶¶ 207-08, 210.) Like the mandatory review of information, at this juncture there is
20 factual issue as to whether Giovanni’s history mandated separation. This issue warrants
21 further discovery.

22 *iv. Other Procedures*

23 Finally, Plaintiffs claim that there seem to be other mandatory initiatives that
24 guide housing inmates in the SHU. (Doc. 68 at 13-14.) They note that the Special Post
25 Order on Sexual Offender/Protective Custody indicates placement will be “methodical,”
26 and Plaintiff claims that BOP has a policy to check if single beds are available before
27 placement. (*Id.*) Further, Plaintiffs claim that it appears that inmates are asked whether
28 they would accept the cell mate, and when an inmate refuses, BOP will find another
cellmate. (*Id.* at 14.) In this case, Giovanni was asked earlier in the day whether he would

1 accept another inmate who was a sex offender. (Doc. 1 at p. 26, ¶ 128; p. 29, ¶¶146-49.)
2 When he refused BOP placed the inmate elsewhere. (*Id.* at p. 33, ¶ 167.) Smith was not
3 so lucky. If these alleged policies exist, Plaintiffs have a good argument that Smith
4 should not have been placed with Giovanni. Again, the omissions preclude the Court
5 from determining conclusively whether the term “methodical” shows the evaluations
6 were mandatory or discretionary.

7 *v. Monitoring Inmates*

8 Moreover, Plaintiffs’ Complaint claims that BOP officers did not follow the
9 measures defined in BOP Program Statement P5270.10. (Doc. 1 at p. 40, ¶ 218.) This
10 directive, they claim, mandates a daily check on inmates by the BOP Lieutenant and BOP
11 personnel. (*Id.*) Plaintiffs believe no one from BOP performed a daily check during the
12 time that Smith was murdered. (*Id.* at p. 41, ¶ 222.)

13 This situation is like *Middleton v. U.S. Fed. Bureau of Prisons*, 658 F. App’x 167,
14 171-72 (3d Cir. Aug. 15, 2016), where the Third Circuit vacated the district court’s
15 granting of a motion to dismiss because the complaint alleged that BOP had Post Orders
16 regarding pat downs that may have been mandatory. Similarly, in *Rich v. United States*,
17 811 F.3d 140, 147 (4th Cir. 2015), the Fourth Circuit remanded for further discovery
18 where Post Orders suggested specific requirements that officers may have had to follow
19 when performing searches. Like these circuits, the Ninth Circuit has also remanded
20 FTCA claims for further discovery because the suggestion of a mandatory policy
21 prevented the court from determining whether the action was covered by the
22 discretionary function exception. *Doe*, 510 F. App’x at 616.

23 In defense, the Government merely reiterates its assertion that the discretionary
24 function exception applies to BOP’s housing decisions. (Doc. 75 at p. 11-14.) This does
25 not, however, address monitoring measures that should have been taken after officers
26 have placed an inmate in housing. And Defendant has offered no affidavits stating this
27 Program Statement was not mandatory, nor provided any regulations that suggest
28 monitoring inmates was within BOP officials’ discretion. *See e.g., Keller v. United*

1 *States*, 771 F.3d 1021, 1024 (7th Cir. 2014) (remanding for further discovery where
2 Program statements were redacted).

3 Plaintiffs' allegation that BOP failed to perform a mandatory monitoring of Smith
4 presents a plausible non-discretionary action. The Court finds that further discovery as to
5 BOP monitoring measures may take this claim outside the purview of the discretionary
6 function exception if it is, in fact, mandatory. This prevents dismissal.

7 b. Public Policy

8 Plaintiffs make no argument that inmate housing decisions are not founded in
9 policy concerns. In fact, cell assignment and security measures in prisons implicate
10 multiple policy concerns. *See Mitchell v. United States*, 149 F. Supp. 2d 1111, 1114 (D.
11 Ariz. 1999) ("Decisions . . . including the number of guards, . . . and tactical choices
12 made surrounding the movement of inmates are judgment calls and choices based on
13 policy determinations that seek to accommodate safety goals and the reality of finite
14 agency resources.").

15 In sum, based on the record before the Court it is impossible to conclude whether
16 the discretionary function exception applies. Therefore, dismissal at this stage is
17 inappropriate.

18 **V. NEGLIGENT GUARD THEORY**

19 Alternatively, Plaintiffs argue that they have raised a viable FTCA claim because
20 BOP employees' cell assignment and failure to check on Smith was due to laziness. (Doc.
21 68 at p. 17.)

22 Some courts have found that a guard's actions are not immune from suit under the
23 discretionary function exception when the "negligent guard theory" applies. *See e.g.*,
24 *Padilla v. United States*, No. LACV 09-05651, 2012 WL 12882367, at *6 (C.D. Cal. Oct.
25 9, 2012); *Middleton*, 658 F. App'x at 171-72; *Palay*, 349 F.3d 418, 430-32 (7th Cir.
26 2003); *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000). The Supreme Court has
27 explained that under the negligent guard theory, a governmental agent's actions may
28 seem to be discretionary, but fail the policy prong of the exception's analysis because the
specific actions "simply cannot be said to be based on the purposes that the regulatory

1 regime seeks to accomplish.” *Padilla*, 2012 WL 12882367, at *6 (quoting *Gaubert*, 499
2 U.S. at 325). This may occur when officials perform discretionary duties in a lazy,
3 careless, or inattentive matter. *Id.* (citing *Triestman v. Fed. Bureau of Prisons*, 470 F.3d
4 471, 476 (2d Cir. 2006).

5 For instance, in *Padilla v. United States*, 2012 WL 12882367, at *7, prison guards
6 placed Padilla with a cellmate after Padilla repeatedly requested to be separated and
7 guards saw that the inmate had caused previous injury to Padilla. *Id.* at *2. Padilla was
8 later killed by his cellmate. *Id.* The court distinguished this case from other similar cell
9 assignment FTCA claims. *Id.* (comparing to *Alfrey*, 276 F.3d at 557 (BOP informed of
10 verbal threat); *Calderon*, 123 F.3d at 947 (same)). Unlike mere threats, which are
11 prospective rather than reflective, the known prior physical injury removed the guard’s
12 discretion, and “would have required staff to separate (them).” *Id.* at *8. The inaction of
13 the guards after finding out about Padilla’s injuries, combined with Padilla’s repeated
14 requests to be removed, could have no basis in furthering any governmental policies,
15 such as inmate safety. *Id.* at 9.

16 Like *Padilla*, the Court finds that the negligent guard theory may also undermine
17 Defendant’s discretion here. While the guards here were not on notice of prior physical
18 altercations between Smith and Giovanni, Plaintiffs assert that Giovanni had a history of
19 violent behavior which would have required his separation. In addition, he made an
20 unambiguous death threat against Smith. “[S]pecific and immediate threats against
21 inmates are less likely to be the type of decision to be grounded [in policy concerns].”
22 *Montez ex rel. Estate of Hearlson*, 359 F.3d at 398. To place Giovanni with Smith under
23 these circumstances could be perceived as careless under the negligent guard theory.

24 Furthermore, the failure to monitor Smith after his transfer to the SHU may be
25 subject to the negligent guard theory. The Court believes the Complaint adequately
26 asserts (1) there was a policy mandating a BOP check on inmates, (2) BOP failed to do
27 so, and (3) there is no explanation for BOP’s failure. (Doc. 1 at p. 33, ¶ 168.)
28 Furthermore, Plaintiffs allege that the SHU was short staffed over the Fourth of July
weekend. (*Id.* at p. 33, ¶ 168.) These facts suggest that the guards may have been

1 inattentive, and perhaps lazy.

2 **VI. CONSTITUTIONAL VIOLATIONS**

3 Plaintiffs allege that their claims are not precluded because they raise
4 constitutional violations; specifically, violations of the Fifth and Eighth Amendments.
5 (Doc. 68 at 7-8.) A constitutional tort, however, is not actionable under 28 U.S.C.
6 §1346(b) because it does not raise a claim that could be considered a violation of state
7 law. *See F.D.I.C.*, 510 U.S. at 477-78 (“By definition, federal law, not state law, provides
8 the source of liability for a claim alleging the deprivation of a federal constitutional
9 right.”). Therefore, Plaintiffs’ FTCA claims cannot succeed on this basis.

10 **VII. DEFENDANT’S UNREDACTED EXHIBITS**

11 The Court has reviewed the exhibits submitted for en camera review and finds that
12 they do not change its analysis. The exhibits do not describe the various separation
13 requirements eluded to in the Special Post Orders, nor define what sources should be
14 utilized during housing determinations. Moreover, the redacted documents include
15 information on defined monitoring schedules related to Plaintiff’s claim. The disclosure
16 only reinforces the Court’s decision that it is too soon to dismiss this matter.

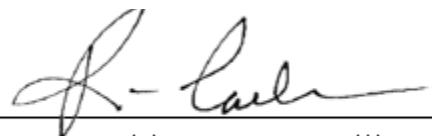
17 **VIII. CONCLUSION**

18 The Court cannot grant a motion to dismiss based on the information currently
19 available. The Court will allow discovery to proceed but may reevaluate Defendant’s
20 discretionary function exception argument should Defendant choose to file a dispositive
21 motion.

22 Accordingly, IT IS ORDERED:

- 23 1. United States of America’s Motion to Dismiss is DENIED. (Doc. 64.)

24 Dated this 9th day of March, 2020.

25
26
27 

28 Honorable Raner C. Collins
Senior United States District Judge